Mayo v NYU Langone Med. Ctr.
2018 NY Slip Op 30456(U)
March 13, 2018
Supreme Court, New York County
Docket Number: 805036/12
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, IAS PART 11

---------- X INDEX NO. 805036/12

DANIEL MAYO, as the Administrator of the Estate of ANNETTE MAYO, deceased.

Plaintiff

-against-

NYU LANGONE MEDICAL CENTER,
Defendant.

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JOAN A. MADDEN, J.:

Plaintiff moves, by order to show cause, for an order, pursuant to CPLR 2104 (i) declaring null and void a settlement agreement executed by plaintiff on January 20, 2016 ("Settlement Agreement") on the ground that it rested upon an erroneous assumption regarding the amount owed to Medicare, and (ii) restoring the action to the trial calendar with a date certain for trial. Defendant opposes the motion.

Background

This action for medical malpractice arises out of decedent's treatment and care at the defendant hospital. Decedent entered the defendant hospital on November 9, 2010, for a total hip replacement. On November 13, 2010, decedent fell out of her bed, and underwent right hip revision surgery. During her hospitalization, defendant contracted Clostridium difficile (a gastrointenstinal bacterial infection), which extended her hospitalization and required various procedures. Decedent was discharged from the defendant hospital to a skilled nursing home facility in March 2011, and died on May 24, 2014. In this action, plaintiff alleges that defendant failed to timely diagnose decedent with Clostridium difficile, and failed to secure and supervise decedent who was prone to falling out of bed.

From October 2014 to January 2016, the parties appeared in court for a number of pre-

trial conferences. On January 15, 2015, the Center for Medicare and Medicaid Services ("CMS") sent a conditional payment letter requesting $2,824.50 in overpayment, and attached a payment summary form listing the claims adding up to the total.[1] The letter advised that "the conditional payment amount listed above is an interim amount. We are still reviewing medical claims related to your case." On July 21, 2015, CMS sent another conditional letter requesting $1,811.95 for overpayment, which letter contained the same language as to January 15, 2015 letter, advising that the amount listed was an interim amount and was still being reviewed.

By letter dated January 5, 2016, which was copied to defendant's counsel, plaintiff notified the court[2] that the action had been settled for $725,000 "inclusive of all liens, attorneys fees, etc, without costs to either side." By letter dated January 6, 2016, plaintiff's counsel wrote defendant's counsel that "[t]he final medicare lien amount is $1,811.95," and requested that he forward releases. Also, on January 6, 2016, plaintiff's counsel signed a stipulation of discontinuance, which was never filed.

On January 6, 2016, counsel for defendant sent plaintiff's counsel Settlement Agreement, a 9-page document, which provides, *inter alia*, that in consideration for plaintiff releasing and discharging defendant:

> The Insurer shall pay the sum of $725,000 (the "Settlement Sum") to be paid as follows at the time of settlement and delivered to plaintiff's

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[1]The "conditional payments," referred to in the letter are those payments made by Medicare, for which reimbursement will be sought from a party responsible for payment for the Medicare beneficiary's care, such as a party recovering a personal injury judgment or a defendant or carrier responsible for paying an injured party pursuant to a settlement or judgment.

[2]The letter was addressed to Justice Alice Schlesinger, who was then presiding over the action.

attorney:

A. Medicare-final-is $2,824.50

B. Remaining amount, $722,175.50 payable to "Daniel Mayo" as Executor of the Estate of Annette Mayo and Krentsel & Guzman, LLP, attorneys (i.e. plaintiff's attorneys).

The Settlement Agreement defines "the Parties" to the agreement as the named plaintiff in this action (i.e. Daniel Mayo, as Executor of the Estate of Annette Mayo), and defendant's liability carrier (hereinafter "Insurer"). Paragraph 14 of the Settlement Agreement, entitled Effectiveness, states that "[t]his Settlement Agreement shall become effective upon execution by the Parties." Paragraph 13 of the Settlement Agreement, entitled Counterparts, states that "[t]his Settlement Agreement may be executed in one or more counterparts each of which shall be deemed an original, but all of which together shall be deemed to constitute one and the same instrument."

On January 20, 2016, plaintiff and his counsel executed the Settlement Agreement, and on January 22, 2016, plaintiff's counsel sent a letter with the executed Settlement Agreement enclosed and requested payment. On that same date, CMS sent a final lien letter notifying plaintiff that Medicare was seeking repayment of $145,764.08 for the cost of the decedent's medical care, and attached a list of its payments made on decedent's behalf. By letter dated February 2, 2016, plaintiff's counsel challenged Medicare's demand amount writing, *inter alia*, that:

> After the plaintiff accepted the settlement in reliance on the $1,811.95 amount stated in the July 15, 2015 letter, we informed Medicare of the settlement and awaited a demand letter fully expecting it to be lower than the conditional payment amount cited in accordance with our prior dealings with MSPRC (i.e. Medicare Secondary Payer Recovery

> Contractor). Instead, we were shocked to receive the January 22, 2016 letter with a demand amount of $145,764.08....It is unclear where this demand amount is coming from, however, this settlement offer was made only in contemplation of decedent's pain and suffering and not for her medical bills which are not part of the settlement amount....

By letter dated March 3, 2016, Medicare upheld its previous determination. In addition, on September 8, 2016, the Qualified Independent Contractor ("QIC")[3] issued an unfavorable reconsideration decision upholding the prior determinations.

Plaintiff next sought reconsideration before an Administrative Law Judge ("ALJ") from the Office of Medicare Hearings and Appeals.[4] By decision and order dated May 15, 2017, the ALJ found that plaintiff was responsible for the conditional payments, plus interest.[5]

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[3]QIC's conduct second level appeals with respect to, inter alia, Medicare and Medicaid appeals.

[4]Plaintiff previously filed a petition in federal court, which was dismissed for lack of subject matter jurisdiction, apparently for failure to exhaust administrative remedies.

[5]The ALJ rejected plaintiff's argument that lien should not be upheld as the basis for the settlement was only pain and suffering, writing that

> According to the MSPM (i.e. the Medicare Secondary Payment Manual), Medicare policy requires recovering payments from liability awards or settlements, whether the settlement arises from a personal injury action or a survivor action, without regard to how the settlement agreement stipulates the reimbursement should be made. Since liability payments are usually based on the injured or deceased's persons medical expenses, liability payments are considered to have been made "with respect to" medical services related to injury even when the settlement does not expressly include an amount for medical expenses. However, the MSPM advises that if the court or other adjudicator on the merits specifically designates amounts that are for pain and suffering or other amounts to related to medical services, Medicare will accept the court's designation. Otherwise, regardless of how the amount is designated in an award or settlement...Medicare is entitled to be reimbursed for its payments from the proceeds of the award or settlement."

In the meantime, neither defendant nor the Insurer signed the Settlement Agreement, nor did the Insurer proffer payment in accordance with paragraph 4 of the Settlement Agreement, under which plaintiff waived the 21-day payment provision provided under CPLR § 5003-a, and "agree[d] that payment of the above settlement amount shall be made within 45 (days) or receipt of the fully executed Settlement Agreement and Release." In addition, judgment was never entered, and no stipulation of discontinuance has ever been filed.

Plaintiff's Motion

Plaintiff now moves pursuant to CPLR 2104 to declare the Settlement Agreement null and void, as it was entered into under an erroneous assumption based on the conditional letters from Medicare that the maximum amount that Medicare would assert was $2,824.50. Moreover, plaintiff argues that there has been no change in position since the Settlement Agreement was entered as defendant has not yet proffered payment and plaintiff has yet to enter judgment based on such failure, and no stipulation of discontinuance has been filed. Alternatively, plaintiff argues that the Settlement Agreement is defective since although it purports to release defendant from "other Liens and Claims," it is ineffective to relieve defendant of the Medicare Lien as to Settlement Agreement provides for the payment of a lien in the maximum amount of $2,824. 50, even though Medicare may still enforce its rights against defendant's insurer.

Defendant opposes the motion, asserting that the Settlement Agreement is enforceable as it satisfies the writing requirement of CPLR 2104, and was not entered into as the result of a "mutual mistake," but, rather, plaintiff's unilateral error in failing to ensure that the amount of

the Medicare lien was correct. In this connection, defendant argues that investigating the extent of the Medicare liens was the sole responsibility of plaintiff, and that his failure to ascertain the correct amount of the liens is a "unilateral mistake," and thus does not provide a basis for voiding the Settlement Agreement, citing Rivera v. State of New York, 115 AD2d 431 (1st Dept 1985)(finding that claimant failed to meet this burden of justifying the setting aside of settlement made in open court based on his unilateral mistake as to the amount of the compensation lien) .

By interim order dated October 23, 2017, the court noted that "there are issues as to whether the [Settlement Agreement] is enforceable as a writing under CPLR 2104 as there is no allegation or evidence that it was signed by defendant," and directed the parties to efile a letter brief regarding this issue.

In its letter brief, defendant argues that the language of CPLR 2104 demonstrates that the Settlement Agreement is binding upon plaintiff since it was signed by plaintiff and his attorney, that the clear and unambiguous language of the agreement shows that it should be enforced according to its terms, and that although the agreement provides that it is not effective unless executed by the parties, the construction and drafting of the agreement, including the purported absence of signature lines for defendant, demonstrates that no signature was required of defendant (or its representative) in order to make the agreement binding. Alternatively, defendant argues that to the extent the court finds the Settlement Agreement ambiguous, parole evidence demonstrates that the agreement is enforceable.

As for plaintiff, he argues that the Settlement Agreement is not binding as it is not filed with the county clerk as required by CPLR 2104, and as it is not signed by both parties.

Discussion

The threshold issue on this motion is whether the Stipulation of Settlement is enforceable under CPLR 2104, which provides that:

> An agreement between parties or their attorneys relating to any matter in an action, other than one made between counsel in open court, is not binding upon a party unless it is in a writing subscribed by him or his attorney or reduced to the form of an order and entered. With respect to stipulations of settlement and notwithstanding the form of the stipulation of settlement, the terms of such stipulation shall be filed by the defendant with the county clerk.

"To be enforceable, stipulations of settlement must conform to the requirements of CPLR 2104 [which as relevant here provides]... that such an agreement be in writing and signed by the parties (or attorneys of the parties) to be bound by it.[6] " Headley v. City of New York, 115 AD3d 804, 807 (2d Dept 2014). At the same time, the courts have have held that a agreement or stipulation with respect a settlement may satisfy the signed writing requirement of CPLR 2104, even if one party fails to sign the agreement. See e.g. Stefaniw v. Cerrone, 130 AD2d 483 (2d Dept 1987)(holding that terms of stipulation were binding on defendant despite the absence of defendant's signature or that of his attorney where plaintiffs' attorney executed the stipulation

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[6]Contrary to plaintiff's position, the failure to file settlement agreement with clerk's office and pay the required fee in accordance with CPLR 2104, would appear to be insufficient alone to render the Settlement Agreement unenforceable. See Gleason Commentaries, McKinney's Consol. Laws of N.Y., Book 7B, CPLR 1401 to 2200, CPLR 2104, at 512-513 (2012) ("the legislative history of the amendments [requiring the filing of stipulation of settlement and payment of a fee] makes clear their purpose was to generate revenue [and that]... if a question arises regarding the enforcement of the settlement, it makes sense to allow any defect to be corrected); see also, Pile v. Grant, 41 AD3d 810, 811 (2d Dept 2007)(contention that stipulation was not enforceable as it was not filed with county clerk was not before the court on appeal, but "in any event is without merit").

prepared by defendant without modification and returned it to the defendant's attorney); see also Williamson v. Delsener, 59 AD3d 291 (1st Dept 2009)(holding that e-mails exchanged between counsel, which contained their printed names at the end, constitute signed writings under CPLR 2104); Morrison v. Bethlehem Steel Corp., 75 AD2d 1001 (4th Dept 1980)(holding that "letters acknowledging settlement and signed by plaintiff's attorney satisfy the requirement of a subscribed writing" under CPLR 2014).

However, even assuming *arguendo* the Settlement Agreement satisfies the minimum requirement of a signed writing under CPLR 2104, to enforce the Settlement Agreement under the rules of contract law, it must be found that the parties intended to be bound by its terms in the absence of the signature of defendant or its representative. See Diarassouba v. Urban, 71 AD3d 51, 57 (2d Dept 2009), lv dismissed 15 NY3d 741 (2010)(noting that "[s]tipulations of settlement are contracts and are, thus, subject to the rules of contract law")(internal citations omitted); De Well Container Shipping Corp. v. Mingwei Guo, 126 AD3d 846, 847-848 (2d Dept 2015)(finding that stipulation of settlement, entitled "Agreement in Principle," was not enforceable where material term of the agreement was contingent on all the parties executing agreement, and the agreement did not state that the two signatories to the agreement intended to bind all the parties to the agreement's terms).

"In determining whether a contract exists, the inquiry centers upon the parties' intent to be bound, i.e., whether there was a 'meeting of the minds' regarding the material terms of the transaction." Amcan Holdings, Inc. v. Canadian Imperial Bank of Commerce, 70 AD3d 423, 426 (1st Dept), lv denied 15 NY3d 423 (2010)(internal citation omitted). In general, a written

contract signed by the parties is not necessary to form a contract as long as the agreement contains its essential terms, and "there is objective evidence establishing that parties intended to be bound." Flores v. Lower E. Serv Ctr., Inc., 4 NY3d 363, 369 (2005). However, "[i]t is well settled that, if the parties to an agreement do not intend it to be binding upon them until it is reduced to writing and signed by both of them, they are not bound and may not be held liable until it has been written out and signed." Jordan Penal Systems, Corp. v. Turner Const Co., 45 AD3d 165, 166 (1st Dept 2007), quoting Scheck v. Francis, 26 NY2d 466, 469–470 (1970).

Here, the Settlement Agreement provides that "[it] shall become effective upon execution by the parties," which provision is indicative of the parties' intent that it would not be binding until executed by the parties. See Amcan Holdings, Inc. v. Canadian Imperial Bank of Commerce, 70 AD3d at 426 ("Generally, where the parties anticipate that a signed writing is required, there is no contract until one is delivered")(internal citation omitted). As for defendant's argument that the absence of a signature line for defendant demonstrates an intent not to require it or its representative to execute the Settlement Agreement, the court notes that the final page of the Settlement Agreement submitted in support of defendants' opposition contains a signature line for the Insurer, and thus shows that the parties intended the Insurer to execute it. In addition, the Settlement Agreement provides that it may be signed in counterparts, indicating an intent to require both parties' signatures, even if not on same document. Finally, even if it could be argued that the Settlement Agreement was ambiguous, any ambiguity would be construed against the defendant, as the party drafting the agreement. See Computer Associates Intern, Inc. v. U.S. Balloon Mfg. Co., Inc., 10 AD3d 699 (2d Dept 2004)(noting that "any

ambiguity in contract language must be construed against the party that drafted the contract").

Accordingly, the court finds that the Settlement Agreement is not binding on the plaintiff since it was not executed by the defendant or the Insurer as required under the express terms of the Settlement Agreement.

Next, the court finds that even if the Settlement Agreement were enforceable in the absence of a signature from defendant or the Insurer, it would be subject to vacatur on the grounds of mutual mistake. In general, to vacate a stipulation of settlement, the moving party must show that a mutual mistake existed at the time the stipulation was entered that was so substantial that it prevented a meeting of the minds. See Matter of Gould v. Board of Educ. of Sweanhaka Cent. High School District, 81 NY2d 446, 453 (1993). Here, plaintiff has met this burden by demonstrating that the Settlement Agreement was the product of a mutual mistake based on the parties' incorrect belief, as reflected in the record demonstrating that the parties' negotiations were based on an assumption that the Medicare lien was $2,824.50, when it was actually $145,764.08, and the terms of the Settlement Agreement drafted by defendant reflected this error.

Furthermore, given the more than $140,000 difference between the two lien amounts, and defendant's potential liability with respect to the Medicare liens, plaintiff has demonstrated that the error was sufficiently substantial so as to prevent a meeting of the minds as to the $750,000 settlement. See Mahon v. New York City Health and Hospital Corp., 303 AD2d 725, 725 (2d Dept 2003)(finding that plaintiff met her burden of vacating the settlement when the parties did not consider the impact of Medicaid lien in negotiating a settlement such that there was no

meeting of the minds as to the amount of damages).

Finally, the cases relied on by defendant are not to the contrary. Thus, while in Rivera v. State, supra, the court found that a settlement made in open court was not subject to vacatur based on plaintiff's unilateral mistake with respect to the amount of a compensation lien, the circumstances in that case are distinguishable as the plaintiff and counsel acknowledged in open court that they understood the terms of the settlement. As the court noted in Rivera, settlements on the record in open court are subject to especially strict enforcement, which "not only serves the interest of efficient dispute resolution but also is essential to the management of the court calendar and the integrity of the litigation process." 115 AD2d at 432. In contrast, in this case, the settlement was not made in open court and plaintiff did not state his agreement to it on the record. Instead, the proposed settlement containing the incorrect lien amount was memorialized in a document which, significantly, was drafted by defendant, and therefore the error cannot be attributed to a unilateral mistake by plaintiff.[7]

Conclusion

In view the above, it is

ORDERED and ADJUDGED that the Settlement Agreement is not binding on the

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[7]Defendant also argues that plaintiff cannot set aside the Settlement Agreement based on a misunderstanding of its terms, or because with the benefit of hindsight he realized it was a bad bargain, citing e.g. Carney v. Carozza, 16 AD3d 867 (3d Dept 2005)(holding that plaintiff could not avoid a settlement based on alleged misunderstanding of its tax consequences); Childs v. Levitt, 151 AD2d 318, 319 (1st Dept), appeal denied 74 NY2d 613 (1989)(noting that "[e]quity will not relieve a party of its obligations under a contract merely because subsequently with the benefit of hindsight, it appears to have been a bad bargain). This argument is unavailing as the circumstances here involve a factual error at the time the agreement was negotiated as opposed to a misunderstanding as to the agreement's consequences.

plaintiff and is hereby vacated; and it is further

ORDERED that the action is restored to the trial calendar in Part 11; and it is further

ORDERED that the parties shall appear for a pre-trial conference on April 19, 2018, at 2:30 pm in Part 11, room 351, 60 Centre Street, New York, NY.

DATED: March 7, 2018

J.S.C.

HON. JOAN A. MADDEN
J.S.C.